

806 KAR 38:100. Risk-based capital for health organizations.

RELATES TO: KRS 304.2-150, 304.2-250(3), 304.2-260, 304.2-270, 304.32-140, 304.38-070, 304.38A-080, 304.38A-110

STATUTORY AUTHORITY: KRS 304.32-140(1), 304.38-070, 304.38A-080, 304.38-150, 304.38A-110(2)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 304.38-150 authorizes the Commissioner of the Kentucky Department of Insurance to promulgate administrative regulations necessary for the proper administration of KRS 304.38. KRS 304.32-140(1), 304.38-070, 304.38A-080, and 304.38A-110(2) require the Commissioner of the Kentucky Department of Insurance to promulgate administrative regulations establishing requirements for risk-based capital. KRS 304.38-150 authorizes that the Commissioner of Insurance to promulgate reasonable administrative regulations necessary for the proper administration of KRS Subtitle 304.38. This administrative regulation establishes requirements for health maintenance organizations, limited health service corporations, and nonprofit health service corporations to comply with risk-based capital reporting requirements to aid in the department's financial monitoring.

Section 1. Definitions. (1) "Adjusted RBC report" means an RBC report that has been adjusted by the commissioner in accordance with Section 2(3) of this administrative regulation.

(2) "Authorized control level event" means any of the following events:

(a) The filing of an RBC report by the health organization that indicates that the health organization's total adjusted capital is greater than or equal to its Mandatory Control Level RBC but less than its Authorized Control Level RBC;

(b) The notification by the commissioner to the health organization of an adjusted RBC report that indicates the event in paragraph (a) of this subsection, if the health organization does not challenge the adjusted RBC report under Section 7 of this administrative regulation;

(c) If, pursuant to Section 7 of this administrative regulation, the health organization challenges an adjusted RBC report that indicates the event in paragraph (a) of this subsection, notification by the commissioner to the health organization that the commissioner has, after a hearing, rejected the health organization's challenge;

(d) The failure of the health organization to respond to a corrective order, if the health organization has not challenged the corrective order under Section 7 of this administrative regulation; or

(e) If the health organization has challenged a corrective order under Section 7 of this administrative regulation and the commissioner has, after a hearing, rejected the challenge or modified the corrective order, the failure of the health organization to respond to the corrective order subsequent to rejection or modification by the commissioner.

(3) "Commissioner" is defined by KRS 304.1-050(1).

(4) "Company action level event" means any of the following events:

(a) The filing of an RBC report by a health organization that indicates that the health organization's total adjusted capital is greater than or equal to its Regulatory Action Level RBC but less than its Company Action Level RBC;

(b) Notification by the commissioner to the health organization of an adjusted RBC report that indicates an event in paragraph (a) of this subsection, if the health organization does not challenge the adjusted RBC report under Section 7 of this administrative regulation;

(c) Pursuant to Section 7 of this administrative regulation, if a health organization challenges an adjusted RBC report that indicates the event in paragraph (a) of this subsection, the notification by the commissioner to the health organization that the commissioner has, after a hearing, rejected the health organization's challenge; or

(d) A health maintenance organization that has total adjusted capital greater than or equal to its Company Action Level RBC but less than the product of its Authorized Control Level RBC and three and zero-tenths (3.0) and triggers the trend test determined in accordance with the trend test calculation included in the NAIC 2019 Risk-Based Capital Forecasting & Instructions, Health.

(5) "Corrective order" means an order issued by the commissioner specifying corrective actions that the commissioner has determined are required, under the provisions of this administrative regulation.

(6) "Department" is defined by KRS 304.1-050(2).

(7) "Domestic health organization" means a health organization domiciled in this state.

(8) "Foreign health organization" means a health organization that is licensed to do business in this state under KRS Subtitle 304.38, 304.38A, or 304.32 but is not domiciled in this state.

(9) "Health organization" means a health maintenance organization, limited health service organization, dental or vision plan, hospital, medical and dental indemnity or service corporation, or other managed care organization licensed under KRS Subtitle 304.38, 304.38A, or 304.32, except for an organization that is licensed as either a life and health insurer or a property and casualty insurer under KRS Subtitle 304.24 or 304.3 and that is otherwise subject to either the life or property and casualty RBC requirements.

(10) "Mandatory control level event" means any of the following events:

(a) The filing of an RBC report that indicates that the health organization's total adjusted capital is less than its Mandatory Control Level RBC;

(b) Notification by the commissioner to the health organization of an adjusted RBC report that indicates the event in paragraph (a) of this subsection, if the health organization does not challenge the adjusted RBC report under Section 7 of this administrative regulation; or

(c) Pursuant to Section 7 of this administrative regulation, the health organization challenges an adjusted RBC report that indicates the event in paragraph (a) of this subsection, notification by the commissioner to the health organization that the executive director has, after a hearing, rejected the health organization's challenge.

(11) "NAIC" means the National Association of Insurance Commissioners.

(12) "RBC" means risk-based capital.

(13) "RBC instructions" means the RBC report including risk-based capital instructions adopted by the NAIC, as these RBC instructions are amended by the NAIC from time to time in accordance with the procedures adopted by the NAIC.

(14) "RBC level" means a health organization's company action level RBC, regulatory action level RBC, authorized control level RBC, or mandatory control level RBC in which:

(a) "Company Action Level RBC" means, with respect to any health organization, the product of two and zero-tenths (2.0) and its Authorized Control Level RBC;

(b) "Regulatory Action Level RBC" means the product of one and five-tenths (1.5) and its Authorized Control Level RBC;

(c) "Authorized Control Level RBC" means the number determined under the risk-based capital formula in accordance with the RBC instructions; and

(d) "Mandatory Control Level RBC" means the product of 0.70 and the Authorized Control Level RBC.

(15) "RBC plan" means a comprehensive financial plan containing the elements established in Section 3(2) of this administrative regulation.

(16) "RBC report" means the report required in Section 2 of this administrative regulation.

(17) "Regulatory action level event" means, with respect to a health organization, any of the following events:

(a) The filing of an RBC report by the health organization that indicates that the health or-

ganization's total adjusted capital is greater than or equal to its Authorized Control Level RBC but less than its Regulatory Action Level RBC;

(b) Notification by the commissioner to a health organization of an adjusted RBC report that indicates the event in paragraph (a) of this subsection, if the health organization does not challenge the adjusted RBC report under Section 7 of this administrative regulation;

(c) If, pursuant to Section 7 of this administrative regulation, the health organization challenges an adjusted RBC report that indicates the event in paragraph (a) of this subsection, the notification by the commissioner to the health organization that the commissioner has, after a hearing, rejected the health organization's challenge;

(d) The failure of the health organization to file an RBC report by the filing date, unless the health organization has provided an explanation for the failure and has cured the failure within ten (10) days after the filing date;

(e) The failure of the health organization to submit an RBC plan to the commissioner within the time period established in Section 3(3) of this administrative regulation;

(f) Notification by the commissioner to the health organization that:

1. The RBC plan or revised RBC plan submitted by the health organization is unsatisfactory; and

2. Notification constitutes a regulatory action level event with respect to the health organization, if the health organization has not challenged the determination under Section 7 of this administrative regulation;

(g) If, pursuant to Section 7 of this administrative regulation, the health organization challenges a determination by the commissioner under this paragraph, the notification by the commissioner to the health organization that the commissioner has, after a hearing, rejected the challenge;

(h) Notification by the commissioner to the health organization that the health organization has failed to adhere to its RBC plan or revised RBC plan, but only if the failure has a substantial adverse effect on the ability of the health organization to eliminate the company action level event in accordance with its RBC plan or revised RBC plan and the commissioner has stated so in the notification, if the health organization has not challenged the determination under Section 7 of this administrative regulation; or

(i) If, pursuant to Section 7 of this administrative regulation, the health organization challenges a determination by the commissioner under this paragraph, the notification by the commissioner to the health organization that the commissioner has, after a hearing, rejected the challenge.

(18) "Revised RBC plan" means an RBC plan that was:

(a) Rejected by the commissioner; and

(b) Revised by the health organization, with or without the commissioner's recommendation.

(19) "Total adjusted capital" means the sum of:

(a) A health organization's statutory capital and surplus (net worth) as determined in accordance with the statutory accounting applicable to the annual financial statements required to be filed under KRS 304.3-240 or 304.32-090; and

(b) Other items, if any, as the RBC instructions provide.

Section 2. RBC Reports. (1) A domestic health organization shall, on or prior to each March 1 (filing date), prepare and submit to the commissioner a report of its RBC levels as of the end of the calendar year just ended, in the NAIC 2019 Risk-Based Capital Forecasting & Instructions, Health. In addition, a domestic health organization shall file its RBC report with the:

(a) NAIC in accordance with the RBC instructions; and

(b) Insurance commissioner in any state in which the health organization is authorized to do

business, if the insurance commissioner has notified the health organization of its request in writing, in which case the health organization shall file its RBC report not later than the later of:

1. Fifteen (15) days from the receipt of notice to file its RBC report with that state; or
2. The filing date.

(2) A health organization's RBC shall be determined in accordance with the formula established in the RBC instructions. The formula shall take the following into account, and may adjust for the covariance between, determined in each case by applying the factors in the manner established in the RBC instructions:

- (a) Asset risk;
- (b) Credit risk;
- (c) Underwriting risk; and
- (d) All other business and relevant risks as are established in the RBC instructions.

(3) If a domestic health organization files an RBC report that is inaccurate, then the commissioner shall adjust the RBC report to correct the inaccuracy and shall notify the health organization of the adjustment. The notice shall contain a statement of the reason for the adjustment.

Section 3. Company Action Level Event. (1) If a company action level event occurs, the health organization shall prepare and submit to the commissioner an RBC plan that shall:

- (a) Identify the conditions that contribute to the company action level event;
- (b) Contain proposals of corrective actions that the health organization intends to take and that would be expected to result in the elimination of the company action level event;
- (c) Provide projections of the health organization's financial results in the current year and at least the two (2) succeeding years, both in the absence of proposed corrective actions and giving effect to the proposed corrective actions, including projections of statutory balance sheets, operating income, net income, capital and surplus, and RBC levels. The projections for both new and renewal business may include separate projections for each major line of business and separately identify each significant income, expense, and benefit component;
- (d) Identify the key assumptions impacting the health organization's projections and the sensitivity of the projections to the assumptions; and
- (e) Identify the quality of, and problems associated with, the health organization's business, including its assets, anticipated business growth and associated surplus strain, extraordinary exposure to risk, and mix of business and use of reinsurance, if any, in each case.

(2) The RBC plan shall be submitted:

- (a) Within forty-five (45) days of the company action level event; or

(b) If the health organization challenges an adjusted RBC report pursuant to Section 7 of this administrative regulation, within forty-five (45) days after notification to the health organization that the commissioner has, after a hearing, rejected the health organization's challenge.

(3) Within sixty (60) days after the submission by a health organization of an RBC plan to the commissioner, the commissioner shall notify the health organization whether or not the RBC plan shall be implemented or is unsatisfactory. If the commissioner determines the RBC plan fails to address the requirements of subsection (1)(a) through (e), the notification to the health organization shall state the reasons for the determination, and establish revisions to correct the RBC plan. Upon notification from the commissioner, the health organization shall prepare a revised RBC plan, which may incorporate by reference any revisions proposed by the commissioner, and shall submit the revised RBC plan to the commissioner:

- (a) Within forty-five (45) days after the notification from the commissioner; or

(b) If the health organization challenges the notification from the commissioner under Section 7 of this administrative regulation, within forty-five (45) days after a notification to the

health organization that the commissioner has, after a hearing, rejected the health organization's challenge.

(4) If the commissioner notifies a health organization that the health organization's RBC plan or revised RBC plan is unsatisfactory, the commissioner may, subject to the health organization's right to a hearing under Section 7 of this administrative regulation, specify in the notification that the notification constitutes a regulatory action level event.

(5) Every domestic health organization that files an RBC plan or revised RBC plan with the commissioner shall file a copy of the RBC plan or revised RBC plan with the insurance commissioner in any state in which the health organization is authorized to do business if:

(a) The state has an RBC provision substantially similar to Section 8(1) of this administrative regulation; and

(b) The insurance commissioner of that state has notified the health organization of its request for the filing in writing, in which case the health organization shall file a copy of the RBC plan or revised RBC plan in that state no later than the later of:

1. Fifteen (15) days after the receipt of notice to file a copy of its RBC plan or revised RBC plan with the state; or

2. The date on which the RBC plan or revised RBC plan is filed under subsections (3) and (4) of this section.

Section 4. Regulatory Action Level Event. (1) If a regulatory action level event occurs, the commissioner shall:

(a) Require the health organization to prepare and submit an RBC plan or, if applicable, a revised RBC plan;

(b) Perform an examination or analysis of the assets, liabilities, and operations of the health organization including a review of its RBC plan or revised RBC plan; and

(c) Subsequent to the examination or analysis, issue an order specifying corrective actions.

(2) In determining corrective actions, the commissioner shall take into account relevant factors with respect to the health organization, based upon the commissioner's examination or analysis of the assets, liabilities, and operations of the health organization, including the results of any sensitivity tests undertaken pursuant to the RBC instructions. The RBC plan or revised RBC plan shall be submitted:

(a) Within forty-five (45) days after the occurrence of the regulatory action level event;

(b) If the health organization challenges an adjusted RBC report pursuant to Section 7 of this administrative regulation and the challenge is made in good faith within forty-five (45) days after the notification to the health organization that the commissioner has, after a hearing, rejected the health organization's challenge; or

(c) If the health organization challenges a revised RBC plan pursuant to Section 7 of this administrative regulation and the challenge is made in good faith, within forty-five (45) days after the notification to the health organization that the commissioner has, after a hearing, rejected the health organization's challenge.

(3) The commissioner may retain actuaries and investment experts and other consultants as necessary to review the health organization's RBC plan or revised RBC plan; examine or analyze the assets, liabilities, and operations, including contractual relationships, of the health organization, and formulate the corrective order with respect to the health organization. The fees, costs, and expenses relating to consultants shall be borne by the affected health organization or other party as directed by the commissioner.

Section 5. Authorized Control Level Event. If an authorized control level event occurs with respect to a health organization, the commissioner shall:

(1) Take action as required under Section 4 of this administrative regulation regarding a health organization with a regulatory action level event; or

(2) If it is in the best interests of the policyholders and creditors of the health organization and of the public, take action as necessary to cause the health organization to be placed under regulatory control under KRS Subtitle 304.33. If the commissioner takes action, the authorized control level event shall be sufficient grounds for the action. If the commissioner takes actions under this subsection pursuant to an adjusted RBC report, the health organization shall be entitled to protections as are afforded to health organizations under the provisions of Section KRS 304.33-130 pertaining to summary proceedings.

Section 6. Mandatory Control Level Event. (1) If a mandatory control level event occurs, the commissioner shall take action as necessary to place the health organization under regulatory control under KRS Subtitle 304.33. The mandatory control level event shall be sufficient grounds for the commissioner to take action.

(2) If the commissioner takes actions pursuant to an adjusted RBC report, the health organization shall be entitled to the protections of Section KRS 304.33-130 pertaining to summary proceedings.

(3) The commissioner may forego action for up to ninety (90) days after the mandatory control level event if there is a reasonable expectation that the mandatory control level event will be eliminated within the ninety (90) day period.

Section 7. Hearings. Upon the occurrence of any of the following events the health organization shall have the right to a confidential departmental hearing, on a record, at which the health organization may challenge any determination or action by the commissioner. The health organization shall notify the commissioner of its request for a hearing within five (5) days after the notification by the commissioner of any of the following events:

(1) Notification to a health organization by the commissioner of an adjusted RBC report;

(2) Notification to a health organization by the commissioner that:

(a) The health organization's RBC plan or revised RBC plan is unsatisfactory; and

(b) Notification constitutes a regulatory action level event with respect to the health organization;

(3) Notification to a health organization by the commissioner that the health organization has failed to adhere to its RBC plan or revised RBC plan and that the failure has a substantial adverse effect on the ability of the health organization to eliminate the company action level event with respect to the health organization in accordance with its RBC plan or revised RBC plan; or

(4) Notification to a health organization by the commissioner of a corrective order with respect to the health organization.

Section 8. Confidentiality; Prohibition on Announcements, and Prohibition on Use in Rate-making. (1)(a) If in the possession or the control of the Department of Insurance, the following shall be confidential:

1. RBC reports, to the extent that the information is not required to be stated in a publicly available annual statement schedule; and

2. RBC plans, including the results or report of any examination or analysis of a health organization performed and any corrective order issued by the commissioner pursuant to examination or analysis with respect to a domestic health organization or foreign health organization.

(b) The commissioner may use the documents, materials, or other information in paragraph (a) of this subsection, in accordance with KRS 304.2-150, 304.2-250(3), 304.2-260, and 304.2-

270.

(2) In order to assist the performance of the commissioner's duties, the commissioner may:

(a) Share documents, materials, or other information obtained under this administrative regulation, in accordance with KRS 304.2-150, 304.2-250(3), 304.2-260(5), and 304.2-270;

(b) Receive documents, materials, or information, including otherwise confidential and privileged documents, materials, or information, from the NAIC and its affiliates and subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information; and

(c) Enter into agreements governing sharing and use of information consistent with this section.

(3)(a) Except as otherwise required or authorized under the provisions of this administrative regulation, a health organization, agent, broker, or other person engaged in any manner in the insurance business shall not make an assertion, representation, or statement with regard to the RBC levels of any health organization, or any component derived in the calculation, by:

1.a. Making, publishing, disseminating, circulating, or placing before the public; or

b. Causing, directly or indirectly, to be made published, disseminated, circulated, or placed before the public; and

2. Using:

a. A newspaper, magazine, or other publication;

b. A notice, circular, pamphlet, letter, or poster;

c. A radio or television station;

d. An advertisement, announcement, or statement; or

e. Any other means that places the information before the public.

(b) A health organization may publish an announcement in a written publication:

1. If the sole purpose is to rebut:

a. A materially false statement with respect to the comparison of the health organization's total adjusted capital to its RBC levels; or

b. An inappropriate comparison of any other amount to the health organization's RBC levels;

2. If these materially false statements or inappropriate comparisons are published in a written publication; and

3. If the health organization is able to demonstrate to the commissioner, with substantial proof, the falsity or inappropriateness of the statement.

(4) The RBC instructions, RBC reports, adjusted RBC reports, RBC plans, and revised RBC plans shall be solely for use by the commissioner in monitoring the solvency of health organizations and the need for possible corrective action with respect to health organizations and shall not be used by the commissioner for ratemaking, nor considered or introduced as evidence in any rate proceeding, nor used by the commissioner to calculate or derive any elements of an appropriate premium level or rate of return for any line of insurance that a health organization or any affiliate is authorized to write.

Section 9. Supplemental Provisions; Rules; Exemption. (1) The provisions of this administrative regulation shall be supplemental to any other provisions of the laws of this state and shall not preclude or limit any other powers or duties of the commissioner under the law, including KRS Subtitle 304.32, 304.33, 304.37, or 304.38, 304.2-065, or 806 KAR 3:150.

(2) If requested, the commissioner shall exempt from the application of this administrative regulation a domestic health organization that:

- (a) Writes direct business only in this state;
- (b) Assumes no reinsurance in excess of five (5) percent of direct premium written; and
- (c) Writes direct annual premiums for comprehensive medical business of \$2,000,000 or less or is a limited health service organization that covers less than 2,000 lives.

Section 10. Foreign Health Organizations. (1)(a) A foreign health organization shall, upon the written request of the commissioner, submit to the commissioner an RBC report as of the end of the calendar year just ended the later of:

1. The date an RBC report would be required to be filed by a domestic health organization under this administrative regulation; or

2. Fifteen (15) days after the request is received by the foreign health organization.

(b) A foreign health organization shall, within thirty (30) days of the written request of the commissioner, submit to the commissioner a copy of any RBC plan that is filed with the insurance commissioner of any other state.

(2)(a) The commissioner may require a foreign health organization to file an RBC plan if a company action level event, regulatory action level event, or authorized control level event occurs with respect to the foreign health organization:

1. As determined under the RBC statute applicable in the foreign health organization's state of domicile;

2. Under the provisions of this administrative regulation, if no RBC statute is in force in the state of domicile; or

3. If the insurance commissioner of the state of domicile fails to require the foreign health organization to file an RBC plan in the manner established under the RBC statute of the domicile state.

(b) If the commissioner chooses to require the filing specified in paragraph (a) of this subsection, the failure of the foreign health organization to file the RBC plan shall be grounds to order the organization to cease and desist from writing new insurance business in the state of Kentucky.

(3) If a mandatory control level event occurs with respect to a foreign health organization and no domiciliary receiver has been appointed with respect to the foreign health organization under the rehabilitation and liquidation statute applicable in the state of domicile of the foreign health organization:

(a) The commissioner may make application to the Franklin Circuit Court permitted under the KRS Subtitle 304.33 with respect to the liquidation of property of foreign health organizations found in this state; and

(b) The occurrence of the mandatory control level event shall be considered adequate grounds for the application.

Section 11. Incorporation by Reference. (1) "NAIC 2019 Risk-Based Capital Forecasting & Instructions Health" is incorporated by reference.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Kentucky Department of Insurance, Mayo-Underwood Building, 500 Mero Street,, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m. (26 Ky.R. 2173; Am. 27 Ky.R. 120; eff. 7-17-2000; TAm eff. 8-9-2007; 40 Ky.R. 2623; 41 Ky.R. 274; eff. 9-5-2014; 47 Ky.R. 1091, 1578; eff. 5-4-2021.)